No. 90-805

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

WESTERN STATES PETROLEUM ASSOCIATION
NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Petitioners,

v.

SONOMA COUNTY, ET AL.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit erred in remanding claims relating to County of San Luis Obispo to the district court for a factual determination concerning mootness where there was insufficient evidence in the record to determine whether the project sponsor had moved to another county the single project which had been submitted to the County under the challenged ordinance, thus rendering moot the challenge to the ordinance based on that project?

2. Whether two trade associations can challenge the validity of two other local land use ordinances when neither of the associations nor any of their members have ever sought permits under the ordinances, where neither the associations nor any of their members have ever identified any property subject to the ordinances, and when neither the associations nor their members have invoked or exhausted available State administrative remedies?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. 90-805

WESTERN STATES PETROLEUM ASSOCIATION;
NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Petitioners,
v.
SONOMA COUNTY, ET AL.
Respondents.

Petition for Writ of Certiorari to the
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Sonoma County, *et al.*, oppose the petition for certiorari to review the Ninth Circuit's affirmance of the district court's judgment.[1]

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[1] This brief is filed on behalf of all of the defendants and intervenors identified in the Petition at ii, with the exception of the City and County of San Francisco. For the Court's convenience, we note at the outset citation forms that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Western States Petroleum Association and the National Ocean Industries Association (hereafter collectively referred to as "WSPA") are cited (continued...)

INTRODUCTION

In reviewing the petition for certiorari of the Western States Petroleum Association and the National Ocean Industries Association, it is important to recognize what is really at issue. WSPA initially filed this action as a challenge to thirteen ordinances of California communities. The district court dismissed the action as to ten of the ordinances on the basis, *inter alia*, that WSPA's challenge was not ripe and that WSPA had failed to exhaust available state administrative remedies. A partial final judgment was entered, and WSPA appealed the district court ruling to the Ninth Circuit. The Ninth Circuit found that the challenge to nine of the ten ordinances was not ripe based on Congress' imposition of a moratorium on the leasing of tracts offshore California. As to one ordinance, the Ninth Circuit found that the record raised a question whether the challenge was moot, and on that basis remanded to the district court for factual findings on mootness.

WSPA has now petitioned this Court to review the rulings of the Ninth Circuit. As to seven of the ten ordinances, WSPA does not challenge the Ninth Circuit's ruling that the actions were not ripe because Congress has barred future leasing. Pet. at 12. Thus, WSPA's petition seeks review of the Ninth Circuit's decision regarding only three ordinances: the County of San Luis

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[1](...continued)
as "Pet. at _____." All references to the opinions below are to those opinions as reproduced in the appendix to the petition and will be cited as "Pet. at _____a." References to the Excerpts of Record and the Supplemental Excerpts of Record in the Ninth Circuit appear as "ER #__" and "Supp. ER #__" respectively, and references to the Clerk's Record in the district court appear as "CR #__."

Obispo, the City of San Luis Obispo and the City of Morro Bay.

As to the County of San Luis Obispo, WSPA asserts that the Ninth Circuit erred in remanding to the district court for a determination whether the claim concerning that county's ordinance was moot. As to the Cities of San Luis Obispo and Morro Bay, WSPA asserts that the determination that the action is not ripe is error even though WSPA never alleged or proved that any one of its members had ever sought a permit for a facility from either of these cities.[2] Nor did WSPA allege or prove that any of its members owned property in either of these cities which might be affected by the ordinances. Nor did WSPA allege or prove that any of its members had invoked or exhausted available State administrative remedies for the siting of such facilities.

This is thus a case in which WSPA seeks a purely advisory opinion from this Court concerning two ordinances under which no permits have ever been sought and a third ordinance where there once was an application but that application may now be moot. Respondents submit that this case is too premature and too speculative to justify this Court's review.

STATEMENT OF THE CASE

This action began as a scatter-shot attempt to obtain an advisory opinion invalidating the separate ordinances adopted by thirteen different California cities and

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[2] In its petition, WSPA states, "Accordingly, the judgment was affirmed without comment as to the cities of San Luis Obispo and Morro Bay, *where there are no permit applications pending.*" Pet. at 13; emphasis added.

counties. Petitioners asserted that these ordinances were "intended to prevent the development of federal offshore oil and gas leases." Pet. at 5. The ordinances do not themselves regulate any offshore activities, such as the construction of drilling platforms or the drilling for oil and gas production. Rather, as the Ninth Circuit observed, they are local "land use ordinances." Pet. at 3a. They regulate the construction within their own jurisdictions of any terminals, refineries, storage and processing units, and other facilities (referred to hereinafter as "onshore petroleum facilities")[3] that may be related to offshore oil and gas development, whether conducted in state or federal waters offshore of these jurisdictions.[4]

Petitioners are two trade associations who themselves will never be involved directly in sponsoring any projects which may be subject to these ordinances. Nor have

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[3] Beyond this general description, the ordinances differ significantly in their wording and possible application. See Pet. at 4. The ordinance adopted by the County of San Luis Obispo simply requires a local referendum relating to approval of onshore petroleum facilities. The ordinance adopted by the City of San Luis Obispo similarly requires a referendum but only in those instances when a "zone change" is proposed to provide for the siting of such facilities. Finally, the ordinance adopted by the City of Morro Bay expressly prohibits such facilities as part of a local coastal plan adopted under the California Coastal Act. In Morro Bay and the City of San Luis Obispo onshore petroleum facilities or other forms of heavy industrialization were also not permitted under zoning and plans that preceded the adoption of these ordinances.

[4] By their terms, the ordinances apply equally to onshore facilities to support development in state waters as well as in federal waters. Evidence below demonstrated that concerns over onshore facility siting to support development in state waters were justified. *See*, Sanders Dec. [ER #65] at 5-7.

petitioners identified a single onshore project which is pending or even planned for future siting in any of these jurisdictions. Not a single oil company which might propose such a project in the future has joined this suit.

Without waiting to see how any such project would be treated under these ordinances, petitioners claimed that the ordinances were preempted by federal law and violated the commerce clause, and other constitutional provisions. The district court's opinion, as amended on appeal by the Ninth Circuit, held that petitioners' constitutional challenges to ten of these ordinances were not ripe for review.[5] It held that further evidentiary proceedings would be required to review the commerce clause claims against three ordinances, but petitioners have chosen not to pursue those claims further at this time.[6]

In addition to holding ten of the ordinances "unripe" for review in advance of their application, the district court also ruled that petitioners had failed to exhaust the further administrative remedies that were available under California law for the siting of onshore energy facilities. Pet. at 33a-35a. Thus while petitioners complain in this

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[5] After holding the challenges to these ten ordinances as unripe for review, the district court then held that those ordinances did not violate any constitutional principles. Pet. at 47a. On WSPA's petition for rehearing, the Ninth Circuit vacated the district court's decision on the merits (Pet. at 12a) leaving no opinion by any court on WSPA's constitutional claims.

[6] In the district court, Petitioners stipulated to a stay of the action with respect to these three ordinances, pending the appeal of the other ordinances. Pet. at 54a, 56a. The three ordinances were those adopted by the Cities of Oceanside and San Diego and the County of San Diego. Pet. at 44a.

Court about the difficulties that they believe their member companies may face in "winning" a referendum in these jurisdictions, they fail to mention that even if that ever came to pass, under California law the State rather than local voters has the final say on whether such energy facilities will be built in these communities.

In the main, the ordinances in the appeal to the Ninth Circuit are considered to be amendments to "Local Coastal Programs" adopted under the California Coastal Act -- whether they expressly recite that fact or not.[7] The Coastal Act specifically provides for appeal to the State Coastal Commission in the event that "energy facility developments" in the coastal zone are turned down at the local level. Section 30515 of the Public Resources Code states that any person "proposing an energy facility development" may request that a local government amend its certified local coastal program to accommodate such facility, and that "[i]f the local

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[7] The California Coastal Act, California Public Resources Code Sections 30000 *et seq.*, passed in 1976, sets general standards for protection of the coastal zone and required developers to secure permits from the California Coastal Commission. Cal. Pub. Res. Code § 30600. It contemplated that this permit authority would be turned over to coastal cities and counties when they had developed "Local Coastal Programs" or "LCP's", which had received Commission approval. *Id.* Section 30514 of the Public Resources Code allows local governments thereafter to amend these local coastal programs "and all local implementing ordinances, regulations and other actions." For example, the ordinance of Morro Bay was adopted as a clarification of its Local Coastal Program. Pet. at 177a (Section 17.72.020.D); *id.* at 178a (Section 17.72.050.B). Amendments of LCPs cannot take effect until the State Commission approves them. Cal. Pub. Res. Code § 30514(a). The San Luis Obispo County ordinance was submitted to and approved by the Coastal Commission under the Coastal Act.

government does not amend its [LCP], such person may file with the Commission a request for amendment." In response, the Commission must determine, *inter alia*, whether the energy facility development turned down at the local level meets "a public need of an area greater than that included within the certified [LCP]" of the locality.[8] Cal. Pub. Res. Code § 30515.

In addition, in those instances where the LCP would allow for the siting of such a facility but it is rejected in a local referendum (or if local officials deny a permit), the Coastal Act provides that the applicant may appeal that decision to the Coastal Commission. Cal. Pub. Res. Code § 30603. This independent right of appeal thus supplements the remedy under Section 30515, which is available in case the LCP already prohibits the onshore petroleum facility. Of course, no member of the petitioners has yet pursued these administrative remedies, so it is impossible to say what decision the Coastal Commission would render if that were to occur. Yet, as the district court observed, "[t]he purpose behind the statute allowing resort to the coastal commission for amendments to the LCP to allow development of a particular type of energy facility is to address precisely the type of issue raised by plaintiffs." Pet. at 35a.

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[8] In this respect, the Coastal Commission's oversight of local decisions on onshore petroleum facilities under the challenged ordinances is part of a structure sanctioned by the federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. Sections 1451 et seq. The Coastal Act was funded and approved under the CZMA, as a program which provides "for adequate consideration of the national interest" in the siting of facilities in the coastal zone. Pet. at 39a. In the court below, petitioners themselves acknowledged that the ordinances constitute a change in the California Coastal Management Program approved under the federal Coastal Zone Management Act. Plaintiffs' Memo. (dated 9/28/87) at 30 [CR #14].

Petitioners appealed the district court's rulings with respect to the ten ordinances. However, prior to the decision of the Ninth Circuit, petitioners moved to dismiss their action against seven of the ordinances on the grounds that it had been rendered moot by Congress' adoption of a one year moratorium on lease sales then planned for the federal Outer Continental Shelf ("OCS") off California. Public Law 101-121, § 112. Petitioners stated that the moratorium had "the effect of making contingent the timing and occurrence of previously scheduled lease sales" and that "the controversy we have raised here may well arise again, *but it is not here now*."[9]

In fact, the moratorium adopted in 1989 was merely the most recent in a string of Congressional moratoria on leasing off the California coast adopted in the past decade.[10] These moratoria confirm that petitioners claims had been "unripe" since the inception of the suit -- not that previously "concrete cases or controversies" had suddenly been rendered "moot."

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[9] Plaintiffs' Memorandum of Points and Authorities In Support of Motion to Vacate Judgment and to Dismiss Appeal as Moot, etc. (November 30, 1989), at 4 (emphasis added).

[10] During the 1980s, Congress imposed leasing moratoria for OCS tracts offshore of all of the local governments involved in the appeal below. *See*, Public Law 97-100, § 109, 95 Stat. 1404; Public Law 97-374, § 108, 96 Stat. 1982; Public Law 98-146, § 113, 97 Stat. 938; Public Law 98-473, § 111, 98 Stat. 1855-56; Public Law 99-190, § 111, 99 Stat. 1243-44; Public Law 99-591, § 111, 100 Stat. 3341-261 to 3341-262; Public Law 100-446, § 111, 102 Stat. 1801. The moratoria covered different areas in different years, but at one time or another, tracts offshore all of the local governments were affected, thus preventing any leasing from occurring offshore California since 1984.

In its decision, the Ninth Circuit observed that "[i]t remains to be seen whether any of the leases remaining off the California coast will ever be offered for sale." Pet. at 17a. If not, "the new ordinances will never come into play." *Id.* The Ninth Circuit held that petitioners' claims were unripe because "the entire case is far too speculative for resolution by a federal court" and "[f]urther delineation of the facts is necessary to shape the issues for review." *Id.*

On this basis, the Court of Appeals affirmed the judgment of the district court that the claims relating to the ordinances, except that of the County of San Luis Obispo, were unripe. As to the County of San Luis Obispo, the Ninth Circuit found that there were factual questions surrounding the status of the single project which had been pending there; thus that aspect of the case was remanded to the district court for further factual development. Pet. at 18a.

Petitioners now contend in this Court that these ordinances somehow stand in the way of their member companies' efforts to develop the OCS oil and gas reserves off the California coast. They point to the supposed vast reserves off the California coast and the urgent need for these resources in the wake of the Persian Gulf crisis. Pet. at 13-15. Yet, they fail to advise the Court that after the Ninth Circuit's decision below, Congress and the President issued an even more sweeping and extended moratorium of OCS leasing off the California coast. On June 26, 1990, President Bush announced the cancellation of all pending lease sales off California, and stated that "more than 99 percent of the California coast will be off limits to oil and gas leasing

and development until after the year 2000."[11] Even with respect to the remaining, limited areas, the President made it clear that no lease sale would be held until 1996 and then only if further environmental studies satisfactorily addressed concerns related to these tracts.[12] The President's announcement was given additional force in November of this year when Congress issued a further one year moratorium on "the conduct of offshore leasing and related activities" in the same areas. Public Law 101-512, § 110.

The uncertainty regarding offshore leasing has always been only one of a series of contingencies affecting the siting of onshore support facilities that WSPA's members may some day propose. The others include: (1) whether offshore oil and gas exploration and development will occur adjacent to the jurisdictions sued herein; (2) whether there will be sites available for onshore facilities outside of the jurisdictions sued herein; (3) whether particular oil companies will in fact propose onshore facilities in each of these jurisdictions; (4) whether the voters will approve such facilities in those jurisdictions requiring voter approval; and (5) whether the State will override any local denial that may occur.

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[11] 26 Weekly Compilation of Presidential Documents 1006 (June 26, 1990). The pending lease sales which were canceled as a result of this announcement included Sale Area 91, off the coast of northern California; Sale Area 119, off the coast of central California; and the vast majority of Sale Area 95, off the coast of southern California.

[12] *Id.*

In their petition for certiorari, petitioners focus largely on the San Luis Obispo County ordinance.[13] They point to the existence of some tracts previously leased off this County, and argue that their member companies have further needs for unspecified onshore sites in this County. However, WSPA identified no currently proposed onshore project or permit application in this county, or in any of the other jurisdictions. Thus, the prior leasing does not alter the string of contingencies described above, or otherwise reduce the uncertainties in the future concerning the application and effects of this ordinance.

The Ninth Circuit's remand to the district court of petitioner's claim regarding the San Luis Obispo ordinance occurred because one of WSPA's member companies, Shell Oil Company ("Shell"), at one time had proposed onshore facilities for siting in that county to serve an existing OCS lease. Pet. at 18a. The project was rejected in a referendum held under the county's ordinance, and Shell then submitted new applications to the County.

However, before the County began processing the second applications, Shell apparently decided to site its onshore facilities elsewhere. As the Ninth Circuit noted:

> The record suggests that Shell has abandoned the San Luis Obispo project, that no other development has

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[13] Petitioners also seek certiorari regarding ordinances adopted by two cities in San Luis Obispo County. However, there have never been any proposals for projects that would be subject to the ordinances in these cities, San Luis Obispo and Morro Bay. Indeed, in their petition, they admit that no permits are pending in these jurisdictions. Pet. at 13. Thus, petitioners not only failed to exhaust their administrative remedies, they have not even invoked the administrative process.

> been proposed, that a new vote was never held, and that the offshore San Luis Obispo lease is now being serviced from onshore facilities in Santa Barbara County. Although the record suggests that the controversy involving Shell's lease may be moot, we cannot be certain because the relevant facts are not adequately developed in the record before us. Accordingly, we remand the question of mootness with respect to Shell's lease offshore San Luis Obispo County.

Id. at 8a. The project was reconfigured to fit entirely within the coastal zone after the election held there,[14] but since it abandoned the project in San Luis Obispo County, Shell never had occasion to seek an override of the local decision from the Coastal Commission.

Finally, contrary to WSPA's assertions, not a single one of the ordinances states that its *regulation of onshore petroleum facilities* is "intended to prevent the development of federal offshore oil and gas leases." Pet. at 5. Rather, the ordinances are clearly motivated by a concern for the environmental impact upon these local jurisdictions of onshore petroleum facilities.[15] There are a number of areas along the California coast which have extensive onshore petroleum facilities and other heavy

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[14] See *von Reis* Dec. [ER #107] at 5-6.

[15] The San Luis Obispo ordinance, on which WSPA focuses, in the words of the district court, "clearly state[s] that [its] only named purpose is the protection of the local environment, natural resources and economy." The two others, adopted by the Cities of Morro Bay and San Luis Obispo, respectively "state a mixed purpose, protection of the local environment and expression of opposition to the proposed drilling on the outer continental shelf" and "state no purposes." Pet. at 43a, 44a.

industrialization. The record in the district court demonstrated that there are ample sites that have been reserved for such facilities along the California coast in areas not subject to the challenged ordinances.[16] The ordinances which are the subject of this action were adopted in jurisdictions where the coastline is largely or entirely devoid of any heavy industrial development.[17] Thus, these communities have a legitimate police power interest in determining whether and where to accept industrial development in the future and in determining the manner in which the community itself will develop.

REASONS FOR DENYING THE WRIT

1. Petitioners' concerns about the "national interest" are neither an appropriate subject for this Court's plenary review nor a reason for otherwise sidestepping the limitations of Article III. Regardless of how much total oil there may be in the OCS off California,

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[16] There currently exist sites for onshore support facilities in Santa Barbara, Ventura, and Los Angeles Counties in addition to a number of sites in Northern California. Travis Dec. [ER #62] at 10.

[17] The declarations filed by respondents below, never contradicted by petitioners, showed that these areas are unsuitable sites for onshore petroleum facilities. *See,* Def. Statement of Genuine Issues, para. 21 (citing declarations) [Supp. ER at 19]. Indeed, in many of the jurisdictions sued herein the capacity of various public services, such as water, sewage, and transportation, which would be required to serve any such onshore petroleum facilities, is limited and insufficient to support such facilities. *Id.*, para. 22. Moreover, the declarations filed below showed that in the jurisdictions sued herein, the siting of onshore petroleum facilities would have significant adverse impacts on the local economy, including such matters as tourism, fishing, and agricultural uses. *Id.*, para. 25.

Congress has *not* "stated in the plainest of terms that the national policy requires development of those resources." Pet. at 14. Nor has the Secretary of the Interior been "authorized and directed to conduct [lease] sales on the California OCS. *Id.* Nor does "Iraq's invasion of Kuwait" (*id.* at 15), suggest a need for *this Court's* immediate attention to this matter.

In fact, Congress has prohibited leasing of the OCS offshore California since 1984; President Bush this year placed 99 percent of the California OCS off limits to leasing through the year 2000; and Congress thereafter specifically *prohibited* the Secretary of the Interior from conducting any lease sales or pre-leasing activity. The President's policy has *not changed* in the wake of "Iraq's invasion of Kuwait." Congress' moratorium was passed, and signed by the President, three months *after* that invasion. *See, supra,* at 9-10.

Clearly, petitioners' grievances with *these national policies* cannot be addressed in this Court. Yet, it is these policies -- not the three local land use ordinances challenged herein -- which stand in the way of petitioners' aspirations for development of the California OCS. Not only do these national policies provide no basis for evading the limitations of Article III in this case, they confirm how unripe petitioners' claims are.

2. The petition also presents no occasion for this Court to resolve any conflict between the Ninth Circuit's decision and that of any other circuit, or of this Court. Petitioners do not seriously argue that there is any

conflict in the circuits.[18] Their principal grievance with the Court of Appeals' decision appears to be its refusal to adjudicate the merits of their claims relating to the ordinance in San Luis Obispo County, but they cannot point to any respect in which that court, in suggesting that their claims relating to that ordinance "may be moot," departed from any decisions of this Court.[19]

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[18] WSPA cites two cases from the District of Columbia Circuit which purportedly held that if a case satisfies the *Abbott Laboratories'* "fitness" test for ripeness, the court need not consider whether the claimant would suffer any hardship from postponing review. *Consolidated Rail Corp. v. United States*, 896 F.2d 574 (D.C. Cir. 1990); *Air Transport Ass'n of America v. Dept. of Transportation*, 900 F.2d 369 (D.C. Cir. 1990). WSPA suggests, without explanation, that the decision below was "in conflict with that view." Pet. at 25-26 n.4. There is clearly no such conflict here because the Ninth Circuit found that "appellants have not satisfied the fitness requirement." Pet. at 7a.

[19] Instead, they contend that the Ninth Circuit's *application* of the "mootness" doctrine was "inconsistent" in its treatment of areas for which no leasing is planned, as opposed to areas in which leasing has already occurred. Pet. at 22. What they ignore is that the Ninth Circuit's decision as to all areas except the County of San Luis Obispo was fundamentally grounded not on the doctrine of mootness but on the fact that petitioners' claims were "unripe" in advance of application of the ordinances. The lower court singled out the San Luis Obispo ordinance as possibly being "moot" only because petitioners had attempted to make that claim appear ripe by reference to a single application by Shell Oil Company which had been turned down in a referendum. The Ninth Circuit apparently concluded that it may be unnecessary to determine whether that claim was made ripe by that single event because of Shell's subsequent decision for its own reasons to site the project elsewhere. For this reason, the Ninth Circuit noted that "the controversy involving Shell's lease may be moot," and remanded to the district court for further factual findings. Pet. at 18a. Absent Shell's

(continued...)

3. The fundamental determination in the lower courts -- that petitioners' claims against the ordinances are not ripe -- presents no occasion for this Court's review, particularly when the basis upon which WSPA seeks review departs so dramatically from traditional Article III jurisprudence. The "error" of the Ninth Circuit's decisions in WSPA's view is that "it was necessary that there be *a current 'proposed development' pending in San Luis Obispo County* before the County's ordinance could be challenged." Pet. at 6-7 (emphasis added). Elsewhere they complain that "those who hold leases from the United States offshore of San Luis Obispo County do not have a ripe controversy *if they have not yet reached the stage of an actual project submitted to the County.*" *Id.* at 13 (emphasis added).

Thus WSPA seeks a purely advisory opinion. Yet WSPA does not cite a single case in which someone has been allowed to challenge a local land use ordinance before its final application and, indeed, with no project pending or even any concrete plans therefor.[20] In *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), this Court refused to entertain even as a "facial challenge" a variety of constitutional challenges brought by a trade association and others to

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[19](...continued)
application, the case otherwise remains in the posture that it was before: none of the ordinances has ever been applied and none may ever be applied in the future.

[20] In prior decisions, this Court has held that there are even more stringent barriers than this to a federal court's adjudication of other kinds of constitutional claims directed at local land use ordinances. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

a federal statute that had never been applied to the association's members. The Court held these challenges unripe because the plaintiffs had "made no showing in the district court that they own tracts of land that are affected by this provision" (*id.* at 296 n.37) or that they had "been applied to appellee or any other private land owner in Virginia" (*id.* at 294 n.36). *See also, id.* at 304.[21] In *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975), this Court held that an association had no standing to challenge the constitutionality of a town zoning ordinance excluding persons of low and moderate income from living in the town where the complaint did not allege that any of the association's members had made any effort involving the town, had taken any steps toward building there, or had any dealings with town officials.

Most recently, in rejecting challenges to policies or regulations apart from their application to specific parcels of land in a fashion harmful to plaintiffs, this Court emphasized that, absent Congressional direction to the contrary, review of regulations as applied on a case-by-case basis "is the traditional, and remains the normal, mode of operation of the courts." *Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3191 (1990).[22] Here, WSPA seeks review of three ordinances

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[21] In *Hodel*, the Court did allow a facial challenge to the statute as an unconstitutional exercise of *Congress' powers* under the Commerce Clause. But the issue was simply the question of the extent of Congress' plenary authority under the Constitution. 452 U.S. at 275-76.

[22] *See also, Wilderness Society v. Griles*, 824 F.2d 4, 15-17 (D.C. Cir. 1987) (the court denied standing to national environmental groups challenging a Bureau of Land Management policy which was alleged to result in a transfer of greater amounts of Alaska land (continued...)

even though it is conceded that no permits have ever been sought pursuant to two of the ordinances, and as to the third ordinance a permit once was sought, but the permit applicant may have abandoned its application without exhausting its remedies and moved the project to another area, thus making moot any potential dispute.[23]

4. There is an even more fundamental reason why the petition must be denied. In their impatience to get to court, the petitioners not only seek to avoid traditional constraints on cases or controversies but also overlook administrative remedies waiting at hand for resolving their grievances short of litigation. In effect, petitioners ask that this Court ignore the outcome of a future referendum required by some of the ordinances and the availability of "administrative relief" under State law. If any of petitioners' members were denied project approval in a local referendum, they would have an automatic right of appeal to the Coastal Commission. If those

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[22](...continued)
from federal ownership to the State or natives because plaintiffs did not point to any specific lands that they wished to use that were to be transferred).

[23] WSPA's excuses for departing from these Article III limitations are misplaced. Obviously the "validity of an ordinance" does not automatically present the pure issue of law which petitioners claim makes the matter *per se* ripe. Pet. at 23. Even if it did, that does not mean the matter is ripe. In *Toilet Goods Association v. Gardner*, 387 U.S. 158, 163-64 (1967), the Court confronted a purely legal question concerning the authority of an administrative agency, but held that judicial review was inappropriate pending actual application of the challenged regulation, which would further illuminate its justification. Thus, the courts have refused to decide even "purely legal issues" in the absence of a concrete controversy.

remedies did not resolve their grievances, the case would be ripe, but it would be ripe on the basis of the full application of the administrative process.

This Court has firmly insisted:

> that an aggrieved party pursue his administrative remedy before the state agency and the state court prior to bringing his complaint to the federal court, so that the true interpretation of the state law may be known and its actual, as opposed to its theoretical, impact on the litigant authoritatively determined before the federal court undertakes to sit in judgment.

Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958). The courts have been particularly reluctant to entertain challenges to state or local laws where, as here, "the administrative process, far from being exhausted, had [not even] begun." *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540, 544-45 (1946). *See also, Hodel v. Virginia Mining and Reclamation Association*, 452 U.S. 264, 297 (1981) (the potential availability of administrative relief "confirms the conclusion" that constitutional challenges are "not ripe for judicial resolution"). Petitioners' failure to exhaust their administrative remedies thus is an independent bar to their suit.

Nor are the burdens of pursuing these remedies (Pet. at 25) any different than the typical burdens of complying with any permit requirement. In *Federal Trade Commission v. Standard Oil*, 449 U.S. 232 (1980), the Court refused to allow Standard Oil to challenge agency action prior to the completion of the agency's proceeding. It characterized Standard Oil's complaint about the burden and expense of participating in that

proceeding as "part of the social burden of living under government." 449 U.S. at 244. The Court further observed that "the effect of the judicial review sought by Standard Oil Company is likely to be interference with the proper functioning of the agency and a burden for the courts" and "intervention also leads to piecemeal review which at the least is inefficient and on completion of the agency process might prove to have been unnecessary." *Id.* at 242.

5. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), relied upon by petitioners (Pet. at 24-25), further illustrates why petitioners' claims are unripe for judicial review. As petitioners note in their brief, the Court did review one statutory provision which created an absolute moratorium on the construction of nuclear power plants by conditioning their certification on the development of waste disposal technologies. Pet. at 24. However, in that instance, there was no administrative relief available to the utility petitioners to remove the absolute bar created by that provision. In the instant case, there are numerous contingencies which make it impossible to determine whether any of the ordinances will ever bar the siting of onshore petroleum facilities, including administrative relief available to oil companies whose projects are denied. *See, supra,* at 10.

On the other hand, in *Pacific Gas and Electric*, the Court specifically declined to entertain a challenge to another provision which created a process for reviewing the nuclear waste storage capacity at each nuclear power plant proposed. Despite the fact that the petitioners claimed -- as the petitioners claim here -- that the State was prohibited as a matter of law from even requiring that the utilities undergo such a process, the Court held that the matter was unripe in advance of the specific

application of that law to a particular project. 461 U.S. at 203.

6. The circumstances in San Luis Obispo County which petitioners advance in support of their petition do not show that any of these ordinances have become "unchallengeable" under the Ninth Circuit's decision, but only that petitioners seek gratuitous, advisory opinions from the courts. They acknowledge that Shell opted for a site in Santa Barbara County rather than pursuing a permit in San Luis Obispo County or its State appeal remedies. They ask "why indeed should the companies be precluded from 'servicing' a lease from an adjacent county, pending a determination of the validity of the ordinance which kept them out of San Luis Obispo in the first place." Pet. at 17. Obviously, Shell is not going to build a facility in Santa Barbara and then "move" it to San Luis Obispo if it gets a favorable decision. WSPA apparently thinks Shell should be able to abort its pursuit of a permit in San Luis Obispo, move its project to Santa Barbara, and *then* sue San Luis Obispo without first exhausting all of the permit requirements in San Luis Obispo and its rights of appeal to the Coastal Commission and without any stake in the outcome. What prevents this is the requirement of a case or controversy and the bar against advisory opinions.[24]

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[24] The two trade associations in this case, who were not themselves involved in sponsoring the project in San Luis Obispo, can scarcely have any greater rights than Shell to seek judicial review at this premature stage. *See, Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 n.14 (1982). WSPA argues, however, that it should be able to pursue Shell's claim, even after the site was abandoned, because there are other unnamed companies who may later be in Shell's position. Thus, it cites *Franks v. Bowman Transportation Co., Inc.*

(continued...)

7. Surely, WSPA's *impatience* cannot serve as a substitute for a concrete case or controversy. The Ninth Circuit ordered a remand regarding the San Luis Obispo ordinance "because the relevant facts are not adequately developed in the record before us." Pet. at 19. Yet petitioners seek to invoke this Court's plenary review without making any effort to show that the record is in fact well enough developed to address this situation without further fact finding by the district court.[25] WSPA

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[24](...continued)
424 U.S. 747 (1976) and *Sosna v. Iowa*, 419 U.S. 393 (1974) for the proposition that cases are not moot so long as there is a probability of recurrence for any member of a class "where a case is brought in a representative capacity on behalf of a class or group of plaintiffs." Pet. at 21. These cases are inapposite for several reasons. First, it is clear that WSPA's challenge is not one capable of repetition but which evades review. Any one of WSPA's members can obtain review by submitting a permit application for an onshore facility and pursuing to conclusion the administrative procedures which are already in place. Second, in both *Franks* and *Sosna*, a class had been certified pursuant to Rule 23, Federal Rules of Civil Procedure, but the named plaintiff had lost his personal stake in the outcome of the case. This Court's decision on mootness relied expressly on the class certification and noted that the unnamed members of the class were identifiable individuals, individually named in the record many of whom had individually participated in the litigation. *See, Franks* at 753-56. In *Franks*, the Court distinguished a finding of mootness in an earlier decision, *Board of School Comm'rs v. Jacobs*, 420 U.S. 128 (1975), because there no class had been certified. "As the action had not been properly certified as a class action by the District Court, we held it moot." 424 U.S. at 754 n.6.

[25] In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), the Court of Appeals remanded for further factual development and this Court declined for that reason to address the issues subject to the remand.

also filed suit in state court seeking to overturn the San Luis Obispo ordinance on the grounds that it was improperly approved under State law, but it has determined not to pursue that case.[26] If any company had cared enough about any of the other ordinances, it could have applied for a permit, obtained a vote, and if it had lost there, it could have sought review before the Coastal Commission. If it had lost before the Coastal Commission, it would then have had a ripe claim for review.

What petitioners ignore in their impatience to get to court is that projects might be *approved* in a future referendum, or in a subsequent administrative process.[27] Why should a "window of opportunity to sue" (Pet. at 7) be afforded WSPA or its members when the project may be approved through the administrative process thus making litigation unnecessary?

8. Even were they ripe, petitioners' claims under the supremacy and commerce clauses would not merit the

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[26] In that action, *Western Oil & Gas Assoc. v. California Coastal Commission, et al.* (San Francisco Superior Court No. 897952), all of the parties have agreed to a stay because of the pendency of this action, but the stipulation provides that the stay may be lifted at any time by any party.

[27] For example, in two separate elections held in Santa Barbara County, measures which sought to restrict specific onshore petroleum facilities proposed by Exxon and Chevron were defeated at the polls, and those projects were allowed to go forward. *See,* Guzman Dec. [ER #62] at 10.

plenary review requested of this Court.[28] *See* Pet. at 19. In the absence of any actually denied project, both claims rest on the insupportable proposition that a constitutionally offensive interference is worked (on, respectively, a federal statute and interstate commerce) by an essentially procedural requirement that development approval be sought through a referendum process, and should that fail, administratively from a state commission. Neither claim has any merit.

Petitioners' argument that the ordinances are preempted by the Outer Continental Shelf Lands Act ("OCSLA") founders on the intent of Congress, manifest in OCSLA, to leave local land use authority unabridged. The normal presumption against implied preemption (*see, Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981)) is especially strong for local exercises of the police power. *See, e.g., Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 715 (1985); *Pacific Gas and Electric*, 461 U.S. at 206; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In devoting OCSLA exclusively to the regulation of offshore activities, Congress was unequivocal that "[r]elevant State, local, regional, or other bodies have, or should have, appropriate procedures and mechanisms to review

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[28] The extraordinary nature of this request, in the absence of any relevant district or appeals court opinion, is particularly apparent in light of this Court's great reluctance to grant certiorari even when just the Court of Appeals has not concluded its deliberations. *See*, Supreme Court Rule 11 ("petition . . . will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court"). The suggestion is nonsensical that by *vacating* the district court's opinion on these constitutional claims, the Court of Appeals somehow enshrined it as the "only authority" (Pet. at 19) on the subject.

[proposed onshore facilities and operations] and *grant or deny permission for them to occur*." H.R. Rep. No. 95-590, 95th Cong., 2nd Sess. 166, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1450, 1575 (emphasis added).[29] Nor can petitioners save their claim by arguing that the ordinances conflict with federal *policy*. Pet. at 18. The Supreme Court has consistently refused to regard mere general pronouncements of national policy as preempting state regulation.[30] *See, Pacific Gas and Electric*, 461 U.S. at 223; *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 633 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

Petitioners' commerce clause argument is equally wide of the mark. Local communities retain their traditional police power, irrespective of the incidental non-protectionist impact that might work on interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960); *see also, Commonwealth Edison*, 453 U.S. at 619; *Exxon Corp.*, 437 at 125. The ordinances here are indisputably not protectionist: they affect in-state and out-of-state companies alike. *See* First Amended Complaint, Pet. at 91a, ¶ 2 (alleging that at least some of the companies that do "most of the actual

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[29] OCSLA itself also explicitly recognizes "the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses . . . and of related development activity. . . ." 43 U.S.C. § 1332(5).

[30] Moreover, petitioners' theory about what constitutes "federal policy" is belied by the fact that, as the Court of Appeals noted, "[i]t is the congressional moratorium, not the ordinances, that is prohibiting [leasing] activity at this time." Pet. at 18a. *See also, supra*, notes 9 and 10 and accompanying text.

work" onshore and off, in support of oil development in federal waters, are located in California).[31]

9. Fundamentally, the granting of certiorari would be inappropriate because, as this Court observed in another context:

> [I]t would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority. . . . In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands.

Pacific Gas and Electric, 461 U.S. at 216.

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[31] The cases relied upon by petitioners, one from 1911 and another from 1923, are wholly inapposite. The only one of any currency does not even involve the commerce clause. *See Hicklin v. Orbeck*, 437 U.S. 518, 523 (1978). The other two "established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents." *Id.*, at 532-33. That principle has no application here.

CONCLUSION

Respondents submit that the petitioners have failed to present this Court with a ripe case or controversy and have failed to exhaust available administrative remedies. This action does not merit the plenary review which petitioners seek, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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